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THE NEW FAIR EMPLOYMENT LAW

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During 1959, the list of thirteen states having fully enforceable fair employment laws was increased by three. Two states, California and Ohio, were added by the prosaic method of adopting appropriate legislation. The third, Alaska, entered by the more romantic process of being admitted as a state with a fair employment law already in effect.

In adopting fair employment laws this year, Ohio and California followed a well-trod path. It is notable, however, that while California adopted a carefully circumscribed bill, adhering closely to the original law enacted in New York in 1945, the new Ohio law is regarded by supporters of such legislation as the most advanced of any fair employment law now in effect.

Reserving details for later, the new law¹ adds sections 4112.01 to 4112.08 and 4112.99 of the Revised Code. Various forms of discrimination in employment because of "race, color, religion, national origin or ancestry" are declared to be "unlawful discriminatory practices." A five-man Ohio Civil Rights Commission is established to administer the law. When charges are filed with the Commission alleging the occurrence of an unlawful discriminatory practice, the Commission is empowered to make an investigation. Where it finds evidence of an unlawful practice, it must attempt to settle the matter by conciliation. Where this fails, the Commission may hold a public hearing and issue a decision. If it finds that an unlawful practice has occurred, it may issue a remedial order which can be enforced through specified court proceedings.

ORIGIN OF THE LAW

Two streams of legislation converged to produce this new detailed and comprehensive anti-discrimination law—administrative legislation adopted by the federal government and the various states and the series of non-administrative anti-discrimination laws adopted over the years in Ohio.

The Administrative Enforcement Process

The administrative method of enforcement had slow beginnings in

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¹Amended Senate Bill No. 10 was passed on April 20, 1959 and approved by the Governor on April 29.

the Nineteenth Century, increased in popularity in the first few decades of the Twentieth Century and achieved widespread application during the New Deal period of the Thirties.² These laws were a response to the increasing realization that criminal sanctions were not precise enough to deal with certain complex types of misconduct. Administrative enforcement was adopted in order to obtain specialized handling of both the determination of guilt and the selection of remedies.³ Administrative agencies were established to perform these functions, with the courts held in reserve to review the fairness of the administrative action and to enforce compliance with agency orders.

The first well-supported move to apply this technique to the area of racial discrimination was directed at the United States Congress rather than the state legislatures. In June, 1941, vigorous protest was heard from Negro and other civil rights organizations against the exclusion of minorities from employment in the growing war industries. President Roosevelt responded by appointing the wartime Fair Employment Practices Committee.⁴ The Executive Order establishing that Committee⁵ directed the inclusion of clauses in all government contracts barring employment discrimination by contractors. The FEPC was directed to police enforcement of those provisions and was empowered to use many of the procedures typical of administrative agencies. However, it was denied the power to issue enforceable orders.⁶ In the following years, a number of organizations joined to form the National Council for a Permanent FEPC which supported Federal fair employment legislation.⁷ The bills introduced at this time drew heavily on the earlier administrative legislation and particularly on the National Labor Relations Act of 1935.⁸ However, these and later efforts to obtain Federal legislation were unable to overcome the barriers raised by the use of the filibuster and other procedural devices by the Southern bloc in Congress.⁹

² DAVIS, ADMINISTRATIVE LAW 4-7 (1951); LANDIS, THE ADMINISTRATIVE PROCESS 1-22 (1938).

³ GELLHORN & BYSE, ADMINISTRATIVE LAW, 3-6 (1954).

⁴ RUCHAMES, RACE, JOBS AND POLITICS, THE STORY OF FEPC 11-21 (1953); Maslow, *FEPC—A Case Study in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407, 408-9 (1946).

⁵ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

⁶ For descriptions of the operations of the wartime FEPC, see ROSS, ALL MANNER OF MEN (1948); RUCHAMES, *op. cit. supra* note 4; FAIR EMPLOYMENT PRACTICE COMMITTEE, FIRST REPORT, (1945); FINAL REPORT, (1947); Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 408-416 (1945).

⁷ KESSELMAN, THE SOCIAL POLITICS OF FEPC 25-46 (1948); RUCHAMES, *op. cit. supra* note 4, at 199-200.

⁸ 49 Stat. 449 (1935).

⁹ The history of the fight in 1944, 1945 and 1946 is described in Maslow, *op. cit. supra* note 4. For subsequent Congressional battles see Maslow and Robinson, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 396-397 (1953). See generally Hunt, *The Proposed Fair Employment Practice Act; Facts and Fallacies*, 32 VA. L. REV. 1 (1945).

Meanwhile, however, efforts were begun to obtain fair employment legislation in the states. The first such law was enacted in New York in 1945,¹⁰ following extensive hearings before a legislative commission which found that discrimination existed, that it was injurious to the interests of the state and its people, that it could be curbed by legislation and that this could be done best by an administrative agency charged with the duty of using methods of conciliation and education but with full enforcement powers to be used where necessary.¹¹ Similar statutes were subsequently enacted in New Jersey in 1945,¹² Massachusetts in 1946,¹³ Connecticut in 1947,¹⁴ New Mexico, Oregon, Rhode Island and Washington in 1949,¹⁵ Michigan, Minnesota and Pennsylvania in 1955,¹⁶ Colorado and Wisconsin in 1957,¹⁷ and California and Ohio in 1959.¹⁸ Alaska adopted a fair employment law in 1953 when it was still a territory.¹⁹ Enforceable fair employment laws now cover all non-Southern industrial states except Indiana. These states include 49.73 per cent of the population of the country, 25.91 per cent of the non-white population and 82.29 per cent of the Jewish population.²⁰

¹⁰ N. Y. LAWS, c. 118 § 1 (1945), which, as amended, is now N. Y. EXEC. LAW §§ 290-301 (1951).

¹¹ REPORT, NEW YORK STATE TEMPORARY COMMISSION AGAINST DISCRIMINATION, Leg. Doc. No. 6 (1945). For other studies of the existence of employment discrimination see authorities cited in MASLOW AND ROBISON, *op. cit. supra*, note 9, at n. 396.

¹² N.J. REV. STAT. §§ 18:25-1 to -28 (Supp. 1958).

¹³ MASS. ANN. LAWS, ch. 151B, §§ 1-10 (Supp. 1958).

¹⁴ CONN. GEN. STAT. §§ 31-122 to -128 (1958), as amended, Pub. Act. No. 145 (1959).

¹⁵ N. M. STAT. ANN. §§ 59-4-1 to -14 (Supp. 1957), as amended by L. 1959, C. 296; ORE. REV. STAT. 659.010 - .115 (Supp. 1957), 659.990 as amended by L. 1959, C. 584; R. I. GEN. LAWS ANN. §§ 28-5-1 to -39 (Supp. 1958); WASH. REV. CODE §§ 49.60.010 -310 (Supp. 1957), as amended by L. 1959, C. 68.

¹⁶ MICH. COMP. LAWS §§ 423,301-311 (Supp. 1956); MINN. STAT. ANN. §§ 363.01 -13 (Supp. 1958); PA. STAT. ANN. tit. 43, §§ 951-63 (Supp. 1958).

¹⁷ COLO. REV. STAT. ANN. §§ 80-24-1 to -8 (Supp. 1957); WIS. STAT. ANN. §§ 111.31 -37 (Supp. 1959), as amended by L. 1959, C. 149.

¹⁸ Senate Bill No. 10, *supra* note 1; CAL. LAB. CODE §§ 1410-32 (1959).

¹⁹ ALASKA COMP. LAWS ANN. §§ 43-5-1 to -10 (Supp. 1957). So-called "voluntary" fair employment laws, which condemn employment discrimination but without enforcement powers, were enacted in Indiana (IND. ANN. STAT. §§ 40-2301 to -2306 (Supp. 1957)); Wisconsin, in 1945 (*supra* note 17); Colorado, in 1941 (*supra* note 17) and Kansas in 1953 (KAN. GEN. STAT. ANN. 44-1001 to -1008 (Supp. 1957)). As already noted, enforcement provisions were adopted in Colorado and Wisconsin in 1947.

²⁰ AMERICAN JEWISH CONGRESS, A REPORT ON STATE ANTI-DISCRIMINATION AGENCIES AND THE LAWS THEY ADMINISTER (Mimeo, 1959). Fair employment ordinances have also been adopted in a number of cities. Few of these, however, are fully enforceable by the administrative process because of home-rule limitations. See Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 YALE L. J. 431 (1947); *The New Pittsburgh Fair Employment Practices Ordinance*, 14 U. PITT. L. REV. 604, 606-09 (1953). With the enactment of the California and Ohio Laws this year, virtually all the effective municipal fair employment laws are now in areas also covered by state laws.

Success of the administratively enforced fair employment law has prompted use of the same technique against other forms of racial discrimination. A number of states have broadened the jurisdiction of agencies originally empowered to act only in the area of employment. Starting with New Jersey in 1948, eight states have amended their fair employment laws by directing their commissions to apply the same procedures to enforce already existing laws against discrimination in hotels, restaurants, theatres and other places of public accommodation.²¹ Massachusetts, New Jersey, Oregon and Washington have further empowered their agencies to deal with discrimination in education,²² and New York has given parallel powers to its education authorities.²³ Six states have applied the same technique to housing operated or assisted by the state or federal governments,²⁴ and this year four states adopted laws applying agency procedures to the general housing market.²⁵ Efforts have been made to add similar broadening amendments to the fair employment laws of other states, and this may be expected in Ohio in the years ahead.

It remains only to note that five of the sixteen agencies enforcing fair employment laws are also charged with preventing employment discrimination based on age.²⁶

Prior Ohio Anti-Discrimination Laws

The road to the 1959 fair employment law in Ohio was paved not only by success of similar laws elsewhere but also by a number of more restricted anti-bias laws and constitutional provisions in this state dating back to 1802. In that year, the state adopted a constitution containing a prohibition of religious tests for public office.²⁷ Forty-nine years later, it approved a constitutional provision barring religious tests for witnesses.²⁸ In 1884, it followed the trend in the Northern states by adopting a "civil rights law," that is, a law prohibiting discrimination in places of public

²¹ COLO. REV. STAT. ANN. §§ 25-1-1 to -5, 25-2-1 to -5, and 25-3-1 to -6 (Supp. 1957); CONN. GEN. STAT. §§ 53-35, -36 (1958), as amended by L. 1959, Pub. Acts Nos. 111 and 113; MASS. ANN. LAWS C. 272, §§ 92A, 98 (Supp. 1958); ORE. REV. STAT. §§ 30.670 -.680 (Supp. 1957); R. I. GEN. LAWS ANN. §§ 11-24-1 to -6 (Supp. 1958); New Jersey, New York and Washington laws cited *supra* in notes 12, 10 and 15, respectively.

²² MASS. ANN. LAWS C. 151C, §§ 1-5 (Supp. 1958); ORE. REV. STAT. §§ 345.240, .250 (Supp. 1957) and the New Jersey and Washington statutes cited *supra* in notes 12 and 15, respectively.

²³ N. Y. EDUC. LAW § 313.

²⁴ MASS. ANN. LAWS C. 151B, §§ 1-10 (Supp. 1958), amended by L. 1959, C. 239 and the Connecticut, New Jersey, New York, Rhode Island and Washington laws cited *supra* in notes 21, 12, 10, 21 and 15, respectively.

²⁵ Colo. H. B. No. 259, approved April 10, 1959, and the Connecticut, Massachusetts and Oregon laws cited *supra* in notes 21, 24, and 15, respectively.

²⁶ Connecticut, Massachusetts, New York, Pennsylvania and Wisconsin fair employment laws, cited *supra* notes 14, 13, 10, 16 and 17, respectively.

²⁷ OHIO CONST. art. I, § 7.

²⁸ *Ibid.*

accommodation,²⁹ enforceable by civil or criminal penalties. In the same year, disqualification from jury service because of race or color was forbidden.³⁰ In 1889 and 1893, laws were passed prohibiting discrimination between white and colored persons in issuing life insurance policies.³¹ In 1915, the legislature forbade discrimination because of religion in civil service employment.³² Finally, in 1935, discrimination in public works employment because of race, creed or color was banned.³³

Mere examination of these constitutional and statutory provisions is no guide to how well they have worked. The meagerness of case annotations in the Code suggests that they have not been vigorously enforced.³⁴ Studies of laws dealing with places of public accommodation have generally come to the conclusion that, as long as they are enforced only by prosecutions or suits for civil penalties, they can be and are openly violated on a large scale.³⁵ Indeed, that is the reason why, as already noted, eight states have placed enforcement of these laws under the jurisdiction of their administrative enforcement agencies.

We turn now to a consideration of the specific terms of the new Ohio law.

THE TERMS OF THE ACT

Section 4112.01 contains conventional definitions of such terms as "person," "labor organization" and "employment agency."³⁶ The definition of "employee" in paragraph (C) includes domestic servants, as is customary. The definition of "employer" in paragraph (B) includes the state but excludes companies employing less than four or more persons in Ohio. Such exemptions for small employers are contained in all but two of the fair employment laws.³⁷ Four is the lowest minimum in any of these stat-

²⁹ OHIO REV. CODE § 2901.35 (1953). For a description of the laws in the various states, see Maslow and Robison, *supra* note 9, at 405, and authorities there cited.

³⁰ OHIO REV. CODE § 2313.47 (1953).

³¹ OHIO REV. CODE §§ 3911.16, 3911.18 (1953).

³² OHIO REV. CODE § 143.26 (1953).

³³ OHIO REV. CODE § 153.59 (1953). Similar limited, non-administrative, prohibitions of discrimination have been adopted in many other states. AMERICAN JEWISH CONGRESS, CHECK LIST OF STATE ANTI-DISCRIMINATION LAWS (1953).

³⁴ No case annotations appear in the OHIO REV. CODE to §§ 153.59, 2313.47, 3911.16 or 3911.18. The annotations to § 143.26 deal with aspects unrelated to racial discrimination. Sec. 2901.35, the 1884 Civil Rights Law, has been involved in 18 reported cases.

³⁵ Maslow and Robison, *supra* note 9, at 406, and authorities there cited.

³⁶ Earlier fair employment laws contain legislative findings concerning the existence and consequences of discrimination. These findings are designed to establish the reasonableness of the statute under the police power. See, *e.g.*, N. Y. EXEC. LAW § 290. No such findings are contained in the Ohio law. Since, as noted *infra*, there is little likelihood of a successful challenge to the constitutionality of the law, the omission of these customary provisions is not likely to have any effect.

³⁷ The exceptions are Wisconsin and Alaska. The Wisconsin statute, while

utes. The highest, twelve, is found in the Pennsylvania law.

Section 4112.02 establishes the conduct that constitutes "unlawful discriminatory practices." Paragraph (A) contains a conventional prohibition of discrimination by employers in hiring and discharging and in the terms or conditions of employment.

Paragraph (B) applies to employment agencies, barring discrimination in referring or classifying applicants. It also bars complying with a discriminatory order from employers. Only three other states have this latter provision, Colorado, Minnesota and Rhode Island.

Paragraph (C) makes it unlawful for any union to limit or classify membership discriminatorily or to discriminate in any way that affects employment status.

Paragraph (D) bars discrimination by employers, unions or joint labor management committees in admission to, or employment in, apprentice training programs. This provision is unique to the Ohio law. It is designed to deal with a problem that has been quite troublesome under other fair employment laws.

Paragraph (E) makes it unlawful for an employer, employment agency or union to ask discriminatory questions of applicants, to keep a record of an applicant's origin, to use discriminatory application forms, to publish discriminatory advertisements, to apply a quota system or to use an agency that discriminates. Similar provisions dealing with discriminatory questions, advertising and records appear in almost all other fair employment laws, but the Ohio provision is cast in a detailed form found in only three other states, Michigan, Pennsylvania and Rhode Island. This paragraph is introduced by the clause, "except where based on a bona fide occupational qualification certified in advance by the commission." This gives religious institutions a very limited exemption from the operation of the act. Most other fair employment laws give religious non-profit groups a complete exemption, thus permitting them not only to favor their own communicants but also, if they choose, to discriminate on the basis of race. The clause in the Ohio act permits at most preference for a group's followers and is presumably limited to those jobs in which religious belief or knowledge is needed for the work to be done.³⁸

belonging in the category of administrative enforcement laws, is less detailed than such statutes usually are. The Alaska law, originally enacted in 1953 with a ten-employee minimum, was amended in 1957 to eliminate this provision.

³⁸ An absolute exemption for religious and other non-profit organizations appears in the fair employment laws of Alaska, California, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island and Wisconsin. The Colorado and Washington laws have complete exemptions for religious non-profit groups only. The Minnesota law gives an exemption to religious and fraternal societies as to questions based on religion where religion is a bona fide occupational requirement. The Connecticut and Michigan laws, like that of Ohio, contain only the "bona fide occupational qualification" clause. It should also be noted that the clause in the Ohio statute is attached only to the paragraph dealing with discriminatory questions, advertisements and the like, and not to

Paragraph (F) prohibits discriminatory "situations wanted" advertisements, a provision in effect in two other states, Michigan and Pennsylvania.

Paragraph (G) is the customary prohibition of discrimination against any person who has participated in proceedings under the act.³⁹

Paragraph (H) is the customary prohibition of aiding and abetting unfair discriminatory practices by others.

Section 4112.03 creates the Ohio Civil Rights Commission, consisting of five members to be appointed by the governor, with the advice and consent of the Senate, for overlapping terms of five years. Members are to receive a salary of \$5,000 a year.⁴⁰

Section 4112.04(A) specifies the duties of the Commission, including such customary items as maintaining offices, adopting rules and regulations, conducting educational programs and filing annual reports. Paragraph (2) of this section directs the appointment of an executive director at an annual salary of \$12,000. Other staff personnel are to be appointed subject to the Civil Service Laws.

Paragraph (7) of this section directs the Commission to make surveys of discrimination, and paragraph (8) requires the Commission to submit reports on such surveys with its recommendations for legislative or other remedial action. Since these provisions are not limited to discrimination in employment, they could facilitate gradual enlargement of the Commission's jurisdiction, paralleling similar developments in other states already described.

Section 4112.04(B) grants the Commission conventional powers to hold hearings, subpoena witnesses, create advisory councils and issue publications. Failure to comply with a Commission subpoena constitutes a contempt punishable, on application of the Commission, by the Common Pleas Court.

Section 4112.05 specifies the requirements for proceedings before the Commission. Under paragraph (A), the Commission is directed to prevent

the basic prohibitions, in paragraphs (A), (B) and (C) of discrimination by employers, employment agencies and unions. Strictly construed, this would bar discrimination by religious institutions in selecting their employees. However, the Commission and the courts might well view the clause in paragraph (E) as an indication of legislative intent to permit such discrimination.

³⁹ This can be traced back to a similar provision in the 1935 National Labor Relations Act, 29 U.S.C. 158(a)(4).

⁴⁰ In this respect, Ohio follows a middle ground. Of the other states, four provide no payment to their commissioners except for expenses (Colorado, Connecticut, Minnesota and New Mexico); four pay the commissioners per diem ranging from fifteen to fifty dollars (California, Michigan, Pennsylvania and Washington); two, like Ohio, pay low salaries, implying that the commissioners are not expected to work full time (Massachusetts and Rhode Island), and only one, New York, pays full-scale salaries. The other four states entrust enforcement to existing agencies, such as the Department of Labor (Alaska, New Jersey, Oregon and Wisconsin).

unlawful discriminatory practices provided that it must use "informal methods of persuasion and conciliation" before instituting a "formal hearing."

Under paragraph (B), proceedings are started when any person charges that an unlawful practice has occurred or when the Commission, on its own initiative, starts an investigation. The power to initiate proceedings is specifically given to seven other commissions, and impliedly to two others.⁴¹ Moreover, by providing for the filing of a complaint by any "person" the statute omits the common requirement that actions can be started only by the "aggrieved" individual. No other state has so broad a provision.⁴² It will make it possible for interested civic groups to initiate enforcement proceedings in areas where the nature of the discrimination practice tends to inhibit the filing of complaints. This may happen where the job in question requires lengthy training and the discriminatory practice discourages minority group individuals from qualifying themselves as "persons aggrieved."

After a charge is filed, the Commission investigates and, if it finds it probable that unlawful practices have occurred, it seeks to eliminate them by informal methods. Where these methods fail, the Commission issues a formal complaint with a notice of hearing to be held before the Commission, a commissioner or a hearing examiner. These provisions are somewhat more carefully spelled out than in most of the earlier fair employment laws but contain no marked departures. The same may be said of the provisions in paragraph (C), dealing with amendments to the complaint and the answer, paragraph (D) dealing with intervention and paragraph (F) which empowers the Commission to take additional testimony.

Paragraph (E) frees the Commission from the common law rules of evidence, a provision contained in eight other laws.⁴³ It also expressly allows the use of statistical evidence to prove discrimination, a provision contained in only one other law.⁴⁴

⁴¹ The power to initiate complaints is given to the commissions in Colorado, Connecticut, Massachusetts, Minnesota, Pennsylvania, Rhode Island and Washington. It appears to be given to the commissions in California and Wisconsin. It is withheld in Alabama, Michigan, New Jersey, New Mexico, New York and Oregon. A number of statutes also empower such officials as the Attorney General to file complaints.

⁴² Most of the statutes provide that complaints may be filed by a person "aggrieved" by an unlawful practice. The Michigan statute is unclear on this, providing at one point that complaints may be filed by "aggrieved" persons and, at another, that charges may be made by any "individual." The Rhode Island statute specifically permits civil rights organizations to file complaints. The Ohio provision, patterned on the corresponding provision of the 1935 National Labor Relations Act, *supra* note 39 (now 29 U.S.C. § 160 (b) (1956)), eliminates all question about the standing of the individual, organization or other body attempting to set the Commission's procedures in motion.

⁴³ Colorado, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania and Rhode Island.

⁴⁴ Rhode Island.

Under paragraph (G), if the Commission finds that the "respondent" (the term applied to the employer, employment agency, union or other agency charged with unlawful practices) has violated the Act, it issues findings of fact and an order requiring the respondent to cease and desist from its practices and to take such affirmative action, including reinstatement with back pay, as the Commission finds will effectuate the purposes of the Act. Under paragraph (H), the Commission is required to issue findings of fact and a formal dismissal of the complaint if it does not uphold the charges.

Section 4112.06 deals with court review and enforcement of Commission orders. Under paragraph (A), any party to a proceeding, including the Commission, may seek judicial review in the Common Pleas Court. There is an express provision permitting review of a refusal by the Commission to issue a complaint. Such provisions are contained in three other laws.⁴⁵ They are designed to meet a problem that has arisen under earlier laws when a commission, or a single commissioner, decides on the basis of the informal investigation that there is no probable cause to believe that an unlawful practice has occurred and therefore dismisses the complaint without holding a formal hearing. Unless some form of judicial review of such a ruling is provided, the decision becomes final even if it is based on the commission's interpretation of the law. While an administrative agency should be given wide latitude in deciding whether to proceed with a case, the review provided in the Ohio law seems desirable. It permits at least limited judicial review of complaint dismissals to correct legal errors and also to prevent arbitrary action.⁴⁶

Under paragraph (B), the court reviews the case and may issue an order enforcing, modifying, or setting aside the Commission's order.

Paragraph (C) has the customary administrative law provision that objections not urged before the Commission shall not be considered by the court except in extraordinary circumstances.

Under paragraph (D), the court may grant a request for the admission of additional evidence that could not reasonably have been produced before the Commission. While other fair employment laws as well as other administrative statutes usually provide that the court shall direct that such additional evidence be heard by the administrative agency, the Ohio statute requires the court to hear it itself. Furthermore, under paragraph (E), the court passes on the Commission's order on the basis of the record,

⁴⁵ Michigan, New Mexico and Rhode Island.

⁴⁶ Of the twelve other statutes, two appear to show a legislative intent to allow judicial review only of orders issued after hearings (Alaska and Washington) and one is unclear (Colorado). In the remaining states, in which the statute is silent on this point, general statutes or judicial principles may permit another form of judicial review. Thus, such review has been permitted in New York under Article 78 of the Civil Practice Act. *Jeanpierre v. Arbury*, 4 N.Y. 2d 238, 149 N.E. 2d 882 (1958).

including the additional evidence. This is a departure not only from conventional practice but also from the theory underlying administrative statutes. Where the court concludes that additional evidence should be considered, the concept of administrative *expertise* suggests that it should be considered and the order reconsidered by the agency rather than the court. However, such requests are rarely made and more rarely granted so that this departure is not likely to be widely tested.

Paragraph (E) also contains the conventional provision that the findings of fact of the Commission shall be conclusive "if supported by substantial evidence."

Paragraph (F) gives the court exclusive jurisdiction subject to appellate review and provides that "violation of the court's order shall be punishable as contempt."

Paragraph (G) dispenses with the necessity of printing a transcript of the record.

Paragraph (H) provides that if no proceeding to obtain judicial review is instituted within 30 days from service of the Commission's order, the Commission may obtain an enforcement decree from the court upon showing that the respondent is subject to the jurisdiction of the Commission and the court. This provision is found in four other statutes.⁴⁷

Section 4112.07 requires all persons subject to the Act to post notices approved by the Commission setting forth excerpts of the Act and other relevant information.

Section 4112.08 requires liberal construction of the Act and further provides that it shall not be deemed to repeal any pre-existing law dealing with discrimination.

Section 4112.99 provides that whoever violates the notice-posting provision of *Section 4112.07* shall be fined \$100 to \$500. This is the only criminal provision in the statute.

IMPLEMENTATION

One fairly safe prediction, based on experience in other states, is that the new fair employment law will not keep many lawyers busy. A striking feature of these laws, in sharp contrast with the labor laws on which they were modelled, is that they do not generate litigation. Figures supplied by agencies in operation prior to this year show that the combined latest annual case load in twelve states came to only 2,333 complaints.⁴⁸ In very few of these cases was the complainant represented by an attorney.

Even more striking is the fact that, since enactment of the first laws

⁴⁷ Colorado, Michigan, New Mexico and Rhode Island.

⁴⁸ Information supplied to the author. This figure includes cases involving discrimination in education, public accommodations and publicly assisted housing, as well as employment.

in 1945, no more than at most two dozen cases have reached the stage of a formal hearing, all the rest having been settled at the informal conciliation stage.⁴⁹ Less than a dozen cases have reached the courts.⁵⁰

This does not mean that no difficult questions of interpretation have arisen. The annual reports of the various commissions reveal the knotty problems they have struggled with and the principles they have established. Since there have been few formal decisions, these reports provide the principal source of case law authority. Generally, the commissions have tended to follow their own precedents, adhering to prior rulings except where moved to review them for the same reasons that courts occasionally reverse themselves. On many of the problems that the new Ohio Commission will face, it will be able to draw on the experience of its older, sister agencies.⁵¹

Is the new fair employment law constitutional? Strangely enough, there is no square authority on this question. None of the existing laws has been put to the test. As already noted, the few cases involving these laws that have reached the courts have not raised the issue of constitutionality. The most one can say is that the reviewing courts have assumed that the laws are valid.

Nevertheless, the 1945 decision of the United States Supreme Court in *Railway Mail Ass'n v. Corsi*⁵² affords a solid basis for assuming that these laws are safe against constitutional attack. The Court there rejected a specific challenge to the constitutionality of a New York statute prohibiting discrimination by unions.⁵³ It was claimed by an association of railway workers that the law was a denial of due process in that it interfered with the union's right to select its own members and further that

⁴⁹ For example, the New York State Commission has held only five formal hearings since its establishment in 1945.

⁵⁰ The annotations under the various statutes reveal only five cases, all in Connecticut and New York. These are *International Bhd. of Elec. Workers', Local 35 v. Commission on Civil Rights*, 140 Conn. 537, 102 A. 2d 291 (1953) (upholding on the facts a finding of discrimination by a union and passing on various procedural questions); *Draper v. Clark Dairy*, 17 Conn. Sup. 93 (1950) (similar decision as to employer); *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954) (finding against employment agency upheld on facts and various procedural matters considered); *Jeanpierre v. Arbury*, *supra* note 46 (holding that dismissal of complaint is reviewable in court but that dismissal here was not arbitrary); *Ross v. Arbury*, 206 Misc. 74, 133 N.Y.S.2d 62 (1954), *aff'd* 285 App. Div. 886, 139 N.Y.S.2d 245 (1955) (upholding notice posting requirement). The author is informed that three other cases have reached the courts in New York in which the decisions were not officially reported. An additional case not yet reported officially is *American Jewish Congress v. Carter*, 142 N.Y.L.J. (N.Y. Sup. Ct.) 3, col. 8, (1959) (reversing dismissal of a complaint by the Commission).

⁵¹ The various state and municipal anti-discrimination agencies have formed the Conference of Commissions Against Discrimination which meets once a year to exchange information on common problems.

⁵² 326 U.S. 89 (1954).

⁵³ N.Y. Civil Rights Law § 43.

it abridged the association's property rights and liberty of contract. The court said:

We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.⁵⁴

Even before this case was decided, the courts had had an opportunity to pass on the laws enacted in many states prohibiting discrimination in places of public accommodation. In at least eleven states these laws have been upheld.⁵⁵ In 1953, a case reached the United States Supreme Court under a similar law in the District of Columbia.⁵⁶ While the question of constitutionality was not raised, the Court commented:

And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.⁵⁷

It is not surprising to find that writers on the subject generally agree that fair employment legislation is constitutional.⁵⁸

In endeavoring to obtain compliance with the restraints placed upon

⁵⁴ 326 U.S. at 93-94.

⁵⁵ *Jones v. Kehrlein*, 49 Cal. App. 646, 194 Pac. 55 (1920); *Darius v. Apostolos*, 68 Colo. 323, 190 Pac. 510 (1919); *Baylies v. Curry*, 128 Ill. 287, 21 N.E. 595 (1889); *Pickett v. Kuchan*, 323 Ill. 138, 153 N.E. 667 (1926); *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N.E. 146 (1895); *Brown v. J. H. Bell Co.*, 146 Iowa 89, 123 N.W. 231, 124 N.W. 901 (1909); *DeCuir v. Benson*, 27 La. Ann. 1 (1875), *rev'd on other grounds*, 95 U.S. 487 (1878); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890); *Rhone v. Loomis*, 74 Minn. 200 (1898); *Nebraska Messenger v. State*, 25 Neb. 674, 41 N.W. 638 (1889); *People v. King*, 110 N.Y. 418 (1888); *Commission v. George*, 61 Pa. Super. Ct. 412 (1915).

⁵⁶ *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

⁵⁷ 346 U.S. at 109. The Supreme Court had earlier assumed the constitutionality of such a statute in *Bob Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), where it affirmed a conviction under the Michigan Civil Rights Act. In *Christie v. 46th Street Theatre Corp.* 265 App. Div. 255, *aff'd* 292 N.Y. 520, 643 (1943), *cert. denied*, 323 U.S. 710 (1944), the court refused to disturb a New York decision upholding the constitutionality of the Civil Rights Law § 40-b, on the authority of *People v. King*, *supra* note 55.

⁵⁸ *Waite, Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349 (1948); *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837, 846-8 (1947); 14 U. PITT. L. REV., *supra* note 20, at 609-11; *Pennsylvania Fair Employment Practice Act*, 17 U. PITT. L. REV. 438, 442-4 (1956).

industry by this new law, the Commission will not be able to rely entirely on the processing of complaints.⁵⁹ In fact, it is plain that one cannot expect complaints to be filed against every employer who discriminates. Unless there is a broad movement among employers toward compliance with the law, merely because it is the law, discrimination will continue to be widespread for a long time.

The extent to which such a movement has occurred in the older FEPC states is not really known. Charges that job bias continues in specific industries are frequently aired in the press, while areas of voluntary compliance are likely to go unnoticed. Perhaps the fact that minority groups continue to seek fair employment legislation is sufficient proof that they are satisfied that it can and does result in substantial concrete improvement in their lot.

The Ohio law, like most of its predecessors, gives the Commission a broad mandate to engage in educational campaigns and to work with local and state-wide advisory councils both to promote compliance by employers and to encourage minority group workers to make use of the new opportunities that the law is designed to create. But changing patterns of conduct by generalized educational campaigns is slow work. There is reason to believe that expeditious processing of a few complaints, culminating in placing non-white workers in jobs they had been refused, accomplishes more education than volumes of leaflets, advertisements and radio scripts. Educational campaigns tend to blur the essential fact that the legislature has made employment discrimination illegal.

There is a widely held view among civil rights groups that the various state commissions have tended to be too cautious up to now in handling cases, that they have avoided proper publicity, that they have been too ready to accept employer excuses and, most of all, that they have lacked a sense of the importance of disposing of cases promptly. The almost complete lack of employer criticism of the commissions tends to prove that these complaints are valid. Industry is being nudged toward the light just a little too gently. It will be interesting to see whether the new Ohio Commission introduces a new note into the picture.

⁵⁹ On the operation of the state commissions, see BERGER, *EQUALITY BY STATUTE*, 109-169 (1952); Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience under the New York Law against Discrimination*, 40 CORNELL L. Q. 40 (1954); Note, *The Operation of State Fair Employment Practices Commissions*, 68 HARV. L. REV. 685 (1955); *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107 (1949); 56 YALE L.J., *supra* note 58; *The Fair Employment Practices Act—Oregon*, 32 ORE. L. REV. 177 (1953).